81-5321

IN THE

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

Case No.

EARL ENMUND,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

I.

Whether a death sentence imposed upon a defendant convicted of felony murder is disproportional to the crime in violation of the Eighth and Fourteenth Amendments to the United States Constitution, where the death sentenced defendant did not actually kill the murder victim; was not actually present at the scene of the killing; did not intend the death of the victim; and was convicted solely as an aider and abettor to the robbery which provided the underlying felony for the felony murder conviction?

TABLE OF CONTENTS

	PAGE NO.
OPINIONS BELOW	4
JURISDICTION OF THE SUPREME COURT	4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	14
APPENDIX	
1. Opinion of the Supreme Court of Florida in Enmund v. State, __So.2d__ (Fla.1981)	A1
2. Order of the Supreme Court of Florida denying rehearing in Enmund v. State, __So.2d__ (Fla.1981)	A22
3. Section 921.141, Florida Statutes (1975)	A23
4. Indictment	A26
5. Judgment and Sentence	A29
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	PAGE NO.
Coker v. Georgia 433 U.S. 584 (1977)	11,12
Enmund v. State __So.2d__ (Fla.1981)(Case No. 48,525, opinion filed April 16)	13
Furman v. Georgia 408 U.S. 238 (1972)	12
Gregg v. Georgia 428 U.S. 153 (1976)	10,11
Lockett v. Ohio 438 U.S. 586 (1978)	11,12,13
Woodson v. North Carolina 428 U.S. 280 (1976)	11
Amend. VIII, U.S. Const.	4,10,14
Amend. XIV, U.S. Const.	4,10,14
Title 28 United States Code, §1257(3)	4
Rule 17, United States Supreme Court Rules	4
§777.011, Fla.Stat. (1975)	5
§921.141, Fla.Stat. (1975)	4

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is not yet officially reported, but it is reproduced in the appendix as item 1. (A1-21)

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion and judgment in this case on April 16, 1981. (A1-21) Petitioner filed a motion for rehearing which was denied on July 20, 1981. (A22) Petitioner asserted below and asserts here a deprivation of his rights as guaranteed under the United States Constitution. Title 28 United States Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction in this Court to review the judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment VIII to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. Amendment XIV, Section 1 to the Constitution of the United States, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Section 921.141, Florida Statutes (1975) which is set forth in the Appendix as item 3. (A23-25)

4. Section 777.011, Florida Statutes (1975)

> Principal In First Degree. Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

STATEMENT OF THE CASE

On May 22, 1975, a Hardee County, Florida grand jury indicted Petitioner for the first degree murder of Thomas Kersey, the first degree murder of Eunice Kersey and robbery of Thomas Kersey. (R8-10)(A26-28) Petitioner proceeded to a joint trial with his co-defendant Sampson Armstrong. (R959-1702)(A1) On September 30, 1975, both men were convicted as charged and both were sentenced to death for the murders. (R110-111,1697,1698,1701)(A29-30) Petitioner also received a life sentence for the robbery conviction. (R110-111,1697, 1698,1701)(A29-30) Another co-defendant, Jeanette Armstrong, was tried separately and was convicted of two counts of second degree murder and one count of robbery. (R16) She received three consecutive life sentences. (A16)

The Supreme Court of Florida affirmed Petitioner's convictions and sentences in the judgment now before this Court.

Around 8:00 a.m. on April 1, 1975, Thomas Kersey and his wife, Eunice, were found shot to death in their rural home in Hardee County, Florida. (R1020-1024,1102-1104)(A1-2) Thomas Kersey was shot twice and his wife was shot six times. (A2) Both .38 caliber and .22 caliber bullets were recovered from each body. (R1134-1144)(A2-3) A quantity of blood was located about five feet away from the bodies, leading investigators to think that one of the perpetrators might have

been wounded. (R1157)(A2) Additionally, Thomas Kersey's wallet was missing. (R1010,1014)(A5) He usually carried a substantial amount of cash and frequently flashed his money indiscriminately. (R1010,1014)(A4-5) A few weeks before the homicides, Petitioner and a friend jointly purchased a calf from Kersey, and at that time, Kersey had opened his wallet and bragged about his money. (R983-989,996-999,1507-1509)(A5)

Later on July 1st, Jeanette Armstrong was located in a nearby hospital under treatment for a gunshot wound. (R1131)(A2) She was married to Petitioner's co-defendant, Sampson Armstrong, and the daughter of Petitioner's common-law wife, Ida Jean Shaw. (R1132,1185)(A2,5)

Neighbors of the Kersey's testified that they heard six to fifteen gunshots the morning of April 1, 1975, between 7:30 a.m. and 8:00 a.m. They were two to three hundred yards from the Kersey residence at the time. (R1043-1045,1049-1050)(A3) Two other witnesses testified to driving by the Kersey residence around 7:35 a.m. on April 1, 1975. (R1025-1026, 1036-1041)(A3) One reported seeing a large cream-colored car on the side of the road occupied by a black male. (R1027)(A3) The car had a license tag with a prefix number of 18. (R1026)(A3) The other witness reported seeing a large, yellow car with a dark top occupied by one person with long hair. (R1041) He did not determine if the person was male or female. (R1041) Two days after the homicides, a yellow and brown Buick with a license tag prefix of 18 was located. (R1095) The car belonged to Ida Jean Shaw. (R1095)

One of Petitioner's neighbors testified that he saw Petitioner and Ida Jean Shaw in their yellow Buick about 6:30 or 6:45 a.m. on April 1, 1975. (R1298-1302)(A4) Two others, a male and a female, were in the back seat. (R1298-1302)(A4) Ida Jean was driving. (R1298-1302)(A4) The car was traveling

north toward the town of Wauchula. (R1298-1302)(A4) At 8:00 a.m., the neighbor saw the car traveling south with Petitioner driving, Ida Jean in the front seat and one of the two others in the back seat was lying down. (R1298-1302)(A4)

J.B. Neal, an acquaintance of Sampson Armstrong, testified that about 11:30 a.m. on the day of the homicides Armstrong told him about the murders. (R1348-1354)(A5) Armstrong said that he and his wife, Jeanette, went to the door of a house outside of Wauchula and asked the elderly man who answered the door for some water for an overheated car. The man went after a jug and Armstrong pulled a gun on the man at the back door. Armstrong told Jeanette to get the man's money. However, the man yelled for his wife who appeared with a gun and shot Jeanette. Armstrong then shot the woman and the old man. Armstrong said that he and Jeanette were both armed and had gone to house to commit a robbery. According to Neal's testimony, Armstrong never implicated Petitioner in the crime. (R1348-1354)(A5)

Ida Jean Shaw, Petitioner's common-law wife of twelve years (R1172,1182)(A5) testified at trial as a Court's witness over defense objections. (R1179-1269)(A6-9) The prosecutor granted her transactional immunity and agreed to dismiss pending perjury charges against her. Her previous inconsistent statements under oath regarding this case was the basis of the perjury charges. (R1178-1179)(A8-9) Shaw told four different stories. First, on the day of the homicide, she said that Jeanette received her gunshot wound when she entered an orange grove to urinate. (R1191-1192)(A6) Later, Shaw told the State Attorney a story implicating Petitioner and Sampson Armstrong in the crime. (R1179-1269)(A6) In two more statements, one a formal deposition, Shaw repudiated the original statement and gave another version implicating two men known as Luke and Willie. (R1179-1269)(A6) She said that Jeanette left with those two

men the night before the homicides and returned the next morning with the gunshot wound. (R1179-1269)(A6) Shaw said that the statement implicating Petitioner and Sampson Armstrong was a fabrication, contrived by agreement with Jeanette with the goal of putting Petitioner and Sampson in jail, thereby freeing the two women of their husbands. (R1179-1269)(A6)

At trial, Ida Jean Shaw testified that Jeanette and Sampson who lived in Lake Placid were visiting her and Petitioner. (R1179-1269)(A7) On Tuesday, April 1, 1975, Ida Jean awoke around 7:45 a.m. (R1186)(A7) Petitioner, Sampson, Jeanette and Ida Jean's yellow and brown Buick were gone. (R1186)(A7) About ten minutes later, either Petitioner or Sampson approached Ida Jean and said that Jeanette had been shot. (R1188,1223)(A7) The four of them went to the hospital. (R1190-1192)(A7) On the return trip to Wauchula, Ida Jean said she asked Petitioner, "Why he did it." Petitioner allegedly responded that he had seen Mr. Kersey's money when he purchased a cow. (R1205-1206)(A7) Ida Jean further testified that on the following day, while she, Sampson, Petitioner and some of Ida Jean's children drove back from the hospital, Sampson gave her $200. (R1195)(A7-8) Via a written note, Sampson indicated the money came from the robbery and that he had $600 left. (R1196-1197,1245-1248)(A7-8) Petitioner said nothing about a robbery. (R1196) Shaw used the $200 to make a payment on Petitioner's truck, but she did not tell Petitioner the money was from a robbery. (R1198-1198) Later, at the direction of Sampson and Petitioner, Ida Jean disposed of her .22 caliber pistol and a .38 caliber pistol belonging to Sampson or Jeanette. (R1198-1201,1231)(A8) Sampson said the guns had been used to kill some people. (R1202)(A8)

Sampson Armstrong testified in his own behalf. (R1413-1417) He denied murdering and robbing the Kersey's and said Ida Jean Shaw lied about his giving her $200. (R1428) Sampson

said he was at his home in Lake Placid from March 30 until Tuesday, April 1, when he heard his wife, Jeanette, had been shot. (R1413-1417)

Petitioner also testified at trial. He said that he awoke at 5:30 a.m. on April 1, ate breakfast, watched news on television and began some errands around town. (R1474-1476) He left Wauchula for his house about 7:45 a.m. (R1477-1478) When he returned home, Ida Jean and Jeanette left in Petitioner's red Plymouth to pay some bills in Avon Park. (R1479-1480) He noticed that Ida Jean had forgotten a check, and he followed them to give it to her. (R1480-1482) In Avon Park, Petitioner saw his Plymouth parked at a store. He stopped, and Ida Jean told him that Jeanette had been shot when she went into an orange grove to urinate. (R1482) Petitioner called Lake Placid to leave a message for Sampson Armstrong and followed the ambulance to the hospital. (R1483-1484)

The Supreme Court of Florida affirmed the sufficiency of the evidence to support Petitioner's convictions. (A1-21) The opinion noted the following conclusions:

> There was no direct evidence at trial that Earl Enmund was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered. J.B. Neal's account of what Sampson Armstrong told him did not include any reference to Enmund. Ida Jean Shaw testified to Enmund's absence that morning and his statements of his complicity. But the only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kersey's money. The evidence, therefore, was sufficient to find that the appellant was a principal of the second degree, constructively present aiding and abetting the commission of the crime of robbery. This conclusion supports the verdicts of murder in the first degree on the basis of the felony murder portion of section 782.04(1)(a).

(A15)

On his appeal to the Supreme Court of Florida, Petitioner raised the issue of the constitutionality of his death

sentence under the Eighth and Fourteenth Amendments, since he was convicted on a felony murder theory, he did not intend the death of the victims, did not actually kill the victims and was not actually present at the scene of the robbery at the time the killings occurred. The Supreme Court of Florida held:

> Appellant contends that since the evidence does not establish that he intended to take life, the death penalty is impermissible under the eighth amendment ban on cruel and unusual punishment. Appellant offers us no binding legal authority that directly supports this proposition, and we therefore reject it.

(A16)

REASONS FOR GRANTING THE WRIT

I.

A DEATH SENTENCE IMPOSED UPON A DEFENDANT CONVICTED OF FELONY MURDER IS DISPROPORTIONAL TO THE CRIME IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHERE THE DEATH SENTENCED DEFENDANT DID NOT ACTUALLY KILL THE MURDER VICTIM; WAS NOT ACTUALLY PRESENT AT THE SCENE OF THE KILLING; DID NOT INTEND THE DEATH OF THE VICTIM; AND WAS CONVICTED SOLELY AS AN AIDER AND ABETTOR TO THE ROBBERY WHICH PROVIDED THE UNDERLYING FELONY FOR THE FELONY MURDER CONVICTION.

The issue of whether a death sentence is a proportionate penalty where the killing for which the defendant stands convicted was unintentional or committed by a co-perpetrator in the course of a felony murder is not new to this Court. However, this Court has never decided this question. In Gregg v. Georgia, 428 U.S. 153 (1976), this Court held:

> ...when a life has been taken deliberately by the offender, we cannot say that the punishment is unvariably disproportionate to the crime. (Emphasis added)

Id., at 187. That holding left open the issue of whether an unintentional killing violates the mandates of the Eighth and Fourteenth Amendments.

During the same year as the Gregg decision, this court specifically reserved ruling on the above issue in Woodson v. North Carolina, 428 U.S. 280, 305 n. 40 (1976). In 1978, the issue arose again in Lockett v. Ohio, 438 U.S. 586 (1978), but the plurality opinion in that case did not reach or address the question. Chief Justice Burger, writing for the Court, did criticize Ohio's death penalty statute for not taking into account as a mitigating factor the lack of a specific intent to cause the death of the victim and the defendant's role in a felony-murder situation. Id.

Three of the concurring Justices in Lockett, although not able to agree on a single opinion, would have gone further than the Court's opinion to hold that the death penalty cannot be constitutionally imposed in a case where a defendant did not possess the intent to kill and/or was only vicariously involved in a felony-murder. Justice Blackmun concluded that, although it was impossible to define "a convincing bright line rule such as was used in regard to rape, Coker v. Georgia, 433 U.S. 584 (1977), to make workable a disproportionality approach" in a case such as Lockett, the sentencing authority should seriously consider a defendant's participation and the character of his mens rea. Lockett v. Ohio, 438 U.S. 586,613 (1978) (Justice Blackmun concurring) Justices Marshall and White, on the other hand, would develop a per se unconstitutional rule where there was no intent to cause death and/or there existed only proof of a felony murder. Justice Marshall noted:

> When a death sentence is imposed under the circumstances presented here, I fail to understand how any of my Brethren--even those who believe that the death penalty is not wholly inconsistent with the Constitution--can disagree that it must be vacated.... The imposition of the death penalty for this crime totally violates the principle of proportionality embodied in the Eighth Amendment's prohibition, Weems v. United States, 217 U.S. 349 (1910); it makes no distinction between a wilful and malicious murderer and an accomplice to an armed robbery in

> which a killing unintentionally occurs. See State v. Lockett, 49 Ohio St.2d 48, 67 (1976)(dissenting opinion).
>
> Permitting imposition of the death penalty solely on proof of felony-murder, moreover, necessarily leads to the kind of "lightning bolt," "freakish," and "wanton" executions that persuaded other members of the Court to join MR. JUSTICE BRENNAN and myself in Furman v. Georgia, 408 U.S. 238 (1972), in holding Georgia's death penalty statute unconstitutional. Whether a death results in the course of a felony (thus giving rise to felony-murder liability) turns on fortuitous events that do not distinguish the intention or moral culpability of the defendants. That the State of Ohio chose to permit imposition of the death penalty under a purely vicarious theory of liability seems to belie the notion that the Court can discern the "evolving standards of decency," Trop v. Dulles, 356 U.S. 86,101 (1959), embodied in the Eighth Amendment, by reference to state "legislative judgments," see Gregg v. Georgia, 428 U.S. 153,175 (opinion of STEWART, POWELL, STEVENS, JJ.).

Lockett v. Ohio, 438 U.S. 586,619,620 (1978)(Justice Marshall, concurring). Justice White relied upon the proportionality rule of Furman v. Georgia, 408 U.S. 238 (1972) and Coker v. Georgia, 433 U.S. 584 (1977) in concluding that a death sentence is disproportionate to the severity of the crime where a defendant did not intend to cause the death of the victim:

> I nevertheless concur in the judgment of the Court reversing the imposition of the death sentences because I agree with the contention of the petitioner...that it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim.
>
> It is now established that a penalty constitutes cruel and unusual punishment if it is excessive in relation to the crime for which it is imposed. A punishment is disproportionate "if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground." Coker v. Georgia, 433 U.S. 584,592 (1977) (Opinion of WHITE,J.). Because it has been extremely rare that the death penalty has been imposed upon those who were not found to have intended the death of the

> victim, the punishment of death violates both tests under the circumstances present here.
>
> * * *
>
> I recognize that approximately half of the States have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death. The ultimate judgment of the American people concerning the imposition of the death penalty upon such defendants, however, is revealed not only by the content of statutes and by the imposition of capital sentences but also by the frequency with which society is prepared actually to inflict the punishment of death. See Furman v. Georgia, 408 U.S. 238 (1972). It is clear from recent history that the infliction of death under circumstances where there is no purpose to take life has been widely rejected as grossly out of proportion to the seriousness of the crime.
>
> * * *
>
> Under, those circumstances the conclusion is unavoidable that the infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to significantly contribute to acceptable or, indeed, any perceptible goals of punishment. (Emphasis added)

Lockett v. Ohio, 438 U.S. 586,624-625 (1978)(Justice White, concurring).

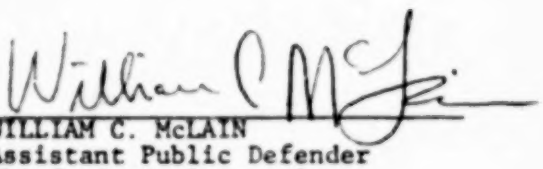
The time is ripe for this Court to squarly address the issue presented in this case. Petitioner's case is an excellent vehicle to decide the troublesome question of whether a defendant should die when convicted of felony murder where a co-defendant killed the victim, even though the defendant himself did not intend the death of the victim and was not present at the time of the killing. The Supreme Court of Florida has carefully sifted the facts and concluded that Petitioner's guilt rests on a felony murder theory. Additionally, that court clearly held that, at best, the facts demonstrated that Petitioner was not actually present at the scene of the murder. Enmund v. State, __So.2d__ (Fla.1981)(Case No. 48,525, opinion

filed April 16). (A15) Petitioner believes his death sentence is disproportional to his crime in violation of the Eighth and Fourteenth Amendments. He urges this Court to grant a writ of certiorari.

CONCLUSION

Upon the foregoing reasons, Petitioner asks this Court to grant a writ of certiorari.

Respectfully submitted,

BY: 

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